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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1000

GUY A. THOMPSON, TRUSTEE OF THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, DEBTOR, AND THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,

Petitioners,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. G. ECKHARDT,
Corpus Christi, Texas;
B. D. TARLTON,
Corpus Christi, Texas;
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I.

(a) Neither statute nor comity vests in primary court of bankruptcy or receivership proceedings exclusive jurisdiction over claims not provable at date of bankruptcy or arising out of act of receiver or trustee in carrying on business 16

(b) Stay Order by Bankruptcy Court entered Dec. 5, 1935, expressly authorized suit on claims against Trustee arising out of operation of trains 13

(c) This suit to recover reasonable value of use made of Respondent's property by Trustee in operation of trains, and neither suit nor judgment causing any interference with property or its use in custody of Bankruptcy Court, exclusive jurisdiction thereof is not in the Bankruptcy Court 17

(d) Orders of the Bankruptcy Court effectively empowered Petitioners, in their discretion, to answer and defend suits on the merits, (provided the judgment laid no burden of any sort upon any property in the custody of the Bankruptcy Court, nor attempted to require payment without consent of said Court), and thereby consented, in event of such answer, that the State Court proceed to here exercise jurisdiction. Therefore, Petitioners having so answered, and neither the suit nor judgment having interfered with or imposed any burden upon any property or its use in the custody of the Bankruptcy Court, but having ordered the judgment certified to the Bankruptcy Court as a claim in administration, said judgment was rendered by the State Court in exercise of its lawful jurisdiction 19

II.

(a) The operations by Petitioners commenced under a contract made in 1904, which fixed a basis of compensation for the use of Respondent's property, all subject to an unqualified termination clause upon notice; Petitioners accepted and operated under contract for several years and became bound by all its terms, including the notice of termination, which was duly given 20

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(b) Sec. 1, Par. 18, Transportation Act, imposed the duty upon operating carriers to continue all operations conducted when said Act became effective until abandonment should be permitted by the I. C. C., but did not deal with nor refer to existing contracts fixing compensation to the owning carrier; therefore, no basis for contention said Act prevented Respondent from exercising its contract right of termination until after Respondent procured from I. C. C. a certificate which would permit Petitioners to abandon their operations 24

(c) Petitioners clearly evidenced their intention to not voluntarily abandon the operations, and there is no power in the I. C. C. or elsewhere to compel abandonment in event a permit to do so should issue. Therefore, the contention Respondent should be required to procure such certificate before it may exercise its right of termination is not substantial 25

(d) The contract which consented to commencement of operations in 1904 and fixed the basis of compensation for use of Respondent's property, is wholly severable and distinct from the operations conducted thereon by Petitioners, and required by Sec. 1, Par. 18 to continue until a certificate permitting abandonment by Petitioners issue by the I. C. C.; therefore, no merit in contention by Petitioners that compensation fixed in 1904 terminable contract continues so long as they continue operations 25

III.

(a) Only jurisdiction of I. C. C. over amount of rentals due by an operating carrier for use of owning carrier's property arises in connection with application by operating carrier for permit to use owning carrier's property under Sec. 1, Pars. 18-20, or Sec. 3, Par. 4, Transportation Act, and no statute confers original and independent jurisdiction in the I. C. C. solely over a controvery as to rentals 26

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(b) Before filing this suit Respondent invoked jurisdiction of I. C. C. over this contract thru an application for approval of termination; I. C. C. declined to file application on ground its jurisdiction is solely over operations by Petitioners who filed no application; Petitioners refused to join in any application or to make an application of their own; therefore, no jurisdiction in I. C. C. with respect to the rentals 6,30

(c) Operations conducted by Petitioners having commenced prior to Transportation Act and now protected by its provisions, said jurisdiction of I. C. C. with respect thereto having never been invoked, no statute vests I. C. C. with any jurisdiction to determine the controversy between Respondent and Petitioners as to the reasonable value of the use made of Respondent's property by Petitioners in continuing said operations 33

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THE TEXAS MEXICAN RAILWAY COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Respondent The Texas Mexican Railway Company herewith respectfully tenders the following Brief in reply to the Petition for Certiorari and its Supporting Brief heretofore filed in the above styled and numbered proceeding.

Statement of Case

1. This suit has resulted from the execution of a contract between Petitioner, St. Louis, Brownsville & Mexico

Railway Company, and Respondent, The Texas Mexican Railway Company, executed November 1, 1904, extending to said Brownsville Company operating privileges on the terminals of Respondent in Corpus Christi and in Robstown, Texas, and its main line between said two points, a distance of approximately 16 miles. The only provision of the contract material here is its termination clause set out in Appendix, page 37, Par. (2). It appears from the Record that in negotiations leading up to the contract Respondent tendered a contract for a five-year term with a sixty-day cancellation clause, and the Vice President and General Manager of said Brownsville Company on August 29, 1904 made a counter tender of a contract for a fifty-year term, with a twelve-months termination clause, assigning as a reason twelve months would be required after notice for the Brownsville Company to build its own line. (S. F. Vol 1 pages 160-161, Record page 161; for Letter see Appendix page 36, Par. (1).)

2. Operations continued under the contract until 1933 when the debtor became party with some seven other subsidiary railroad corporations of the Missouri Pacific Railroad Company to a reorganization proceeding instituted under Sec. 77 of the Bankruptcy Act in the United States District Court at St. Louis (S. F. pages 23-25, Record pages 117-118). Petitioner Trustee is common Trustee for all. Sec. 77 was enacted March 3, 1933, and the bankruptcy proceeding was filed March 31, 1933 (S. F. 8, Record p. 107).

3. In said proceeding the Bankruptcy Court entered an order May 9, 1943, specifically authorizing the debtors to institute and prosecute and,

> "likewise to defend or liquidate by written agreement or consent judgments, any claims, actions, proceedings or suits now pending against any of said debtors

or which may hereafter be asserted or be brought in any court or before any officer, department, commission or tribunal to which any such debtors is or shall be a party, but no payments shall be made by the debtors in respect of any such claims accruing prior to the respective dates of approval of the petitions of the respective debtors herein or in respect to any actions, proceedings, or suits on such claims without authority or direction of this Court, and no action taken by the debtors in defense or liquidation of any such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon or right in the property or funds in the possession of the debtors that otherwise would not exist." (S. F. 29-30, Record 122.)

4. On June 22, 1933, the Bankruptcy Court entered an order vesting in the Trustees,

"all of the powers, rights and privileges heretofore granted to or conferred upon the respective debtors, or any of them, pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and each and all of the orders heretofore entered in this proceeding shall, with respect to the Trustees and the property in their possession, be of like force and effect as though said Trustees were therein specifically named in place of said respective debtors, all of said orders being hereby incorporated in and made a part of this order by reference." (S. F. 16, Record 112.)

5. On November 14, 1933, the Bankruptcy Court entered an order staying all suits until after final decree in the cause.

"(other than claims for injuries to or death of employes) * * * which have for their object the enforcement of any lien or judgment against the property of the debtors in the hands of the Trustees * * *." (S. F. 32-33, Record 124.)

6. On December 2, 1935, because existing stay orders did not conform to Subdivision (j) of Sec. 77 of the Act relating to bankruptcy as amended August 27, 1935, 49 Stat. 911, the Bankruptcy Court repealed all stay orders and stipulated the following exceptions:

> "Provided, however, that suits or claims for damages caused by the operation of trains, buses or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeal is hereby vacated." (S. F. 34, Record 125.)

7. The Bankruptcy Court entered its order May 9, 1933, allowing the Trustee until October 31, 1933, in which to disaffirm contracts, to be evidenced by notice in writing to the opposite party (S. F. page 29, Par. 3, Record page 121). No notice was given and the contract was continuously acted upon until October 31, 1940. It is admitted that Respondent gave notice of termination twelve months after Noyember 1, 1940. Said notice was ignored by Petitioners. (Appendix Par. 5 p. 39.)

8. About August, 1941, Respondent tendered its application to the Interstate Commerce Commission, copies of which were delivered to Petitioners, asking that the termination be approved. Said application is copied in the Record, S. F. Vol. 1, pages 142-157, Record pages 175-185. The Chief Operating Official in Texas was H. R. Safford (S. F. Vol. 1, page 169, Record page 29). The Secretary declined to file and returned said application, stating in substance that jurisdiction of the Commission under Sec. 1 (18) of the Interstate Commerce Act extended only to abandonment of operations by the St. Louis, Brownsville & Mexico Company, which had filed no application, a copy of which letter went to Mr. Safford. (Appendix page 37, Par. (3); S. F. Vol. 1, pages 157-158, Record page 185.)

9. About November 5, 1941, Respondent wrote Mr. Safford among other things that there had been no expression of intentions with respect to termination, and that Respondent hoped Petitioner would join in an application to the Interstate Commerce Commission for approval of cancellation of the contract (S. F. Vol. 1, page 96, Record page 157; Appendix Par. 4, p. 38).

10. About November 5, 1941, Respondent wrote Mr. Safford that as Petitioner was still operating and the cancellation became effective November 1, 1941, from that date the charge for using Respondent's facilities would be $500.00 per day. (Appendix page 38, Par. (4); Tr. Par. 21, p. 40, Record page 33).

11. About November 29, 1941, Mr. Safford wrote rejecting any charge, "except such as may be in accordance with the contract of November 1, 1904, as supplemented or amended to date" (S. F. Vol. 1, p. 183, Record p. 158).

12. Since November 1, 1941 Petitioner Trustee has continued his use of Respondent's property from Corpus Christi to Robstown in operating his trains (S. F. Vol. 1, page 175, Record page 154).

13. Petitioner does not intend to make any application to the Interstate Commerce Commission for a certificate permitting abandonment of the operations, and no such application was ever filed (S. F. Vol. 1, Par. 26, page 98, Record page 159). He intends to continue the operations "so long as may be required by law" (S. F. 97-98, Record 158-159).

14. Respondent thereafter on May 25, 1942, instituted this suit in the 94th District Court of Nueces County, Texas, alleging the contract; its termination; continued use of the property by Petitioners; their refusal to pay any compensation except as fixed by the contract; and

prayed for injunction, damages and general relief (S. F. 37-52, Record pages 127-137).

15. Petitioners jointly answered solely to the merits on June 20, 1942, with the prayer,

> "Having fully answered, these Defendants (Petitioners) say that Plaintiff (Respondent) is not entitled either at law or in equity to the injunctive relief sought nor the sums of money demanded, nor any of the relief prayed for in its petition, and these Defendants pray judgment that Plaintiff take nothing by its action against them, and that they and each of them go hence without day and recover of and from Plaintiff their costs." (Tr. 11, Record 9.)

16. On the same day Petitioners invoked the jurisdiction of the Court by making demand upon Respondent for Admissions of Facts (Tr. 12-15, Record 9-11), which was responded to July 2, 1942 (Tr. 16-18, Record 12-14).

17. Various terms of the Court passed between June 20, 1942 and July 30, 1943 (S. F. Vol. 1, pages 122-123, Record page 163), and on July 30, 1943, Petitioners filed their first plea or motion of any sort challenging jurisdiction of the Court or asking it to stay this suit (Tr. 58-67, Record pages 48-55, and Tr. 68-76, Record pages 56-63).

18. The plea to the jurisdiction then filed by Petitioner Trustee was expressly conditioned to be without waiver of his right to go to the Bankruptcy Court or any other court for relief against prosecution of this suit (Tr. 58, Record page 48).

19. A substantial part of the relief sought by Respondent was fixation of compensation for the use of Respondent's tracks and facilities by Petitioner Trustee in the operation of his trains (Tr. Pars. II and III, Motion by Petitioners for Rehearing in the Court of Civil Appeals, Rec-

ord pages 200-201; Tr. Par. VIII, pages 55-56, Record pages 46-47; Tr. Par. V, pages 51-53, Record pages 43-44).

20. Petitioners never sought prior to entry of final judgment to strike from the petition the count and prayer for injunction, but thruout the plea and prayer sought dismissal or stay of the suit as a whole (Tr. Par. 15, page 66, Record p. 55); Tr. Par. 15, page 75, Record pages 62-63; Motion for Peremptory Instructions, Pars. 1 and 2, Tr. 87, Record page 70; Tr. 89-92, Record pages 71-74).

21. Petitioners pleaded the ultimate stay order (which conforms to Sub. (j) of Sec. 77 of the Act relating to bankruptcy as amended August 27, 1935) to be:

> "That commencement or continuation of suits against any of debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings; provided, however, that suits or claims for damages caused by the operation of trains, buses or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction, and any order heretofore staying the prosecution of any such causes of action or appeals is hereby vacated." (Par. 11, Tr. 73, Record 61.)

That Respondent was seeking to interfere with and violate stay orders; that the suit was not for damages caused by operation of trains, but was to prevent the Petitioner from pursuing its business as a common carrier, and of the use of the properties and employees of Respondent (Par. 14, Tr. 74-75, Record 62); and,

> "That the suit of Plaintiff further seeks to recover of Defendant, The St. Louis, Brownsville & Mexico Railway Company, a sum in excess of, or at least different from, the rental provided in said contract of November 1, 1904 * * *." (Par. 14, Tr. 75, Record 62.)

22. The answer on the merits admitted notice of termination (Par. 5, Tr. 5, Record page 4); pleaded that the use

of the properties was in accordance with the contract which was valid and subsisting; that both parties were interstate carriers, subject to the Interstate Commerce Act, and by Sec. 1, Pars. 18, 19 and 20 of the Transportation Act of February 28, 1920, it was unlawful for Petitioners to abandon their operations without a certificate from the Commission (Par. 6, Tr. 6 and 7, Record pages 4-5); that no certificate permitting Petitioners to abandon the operations commenced under the contract at issue,

> "Wherefore, these defendants say that any and all notices of cancellations and any other act or word by plaintiff seeking to bring about a cessation of operations under said contracts were and are utterly void and without any legal effect; and that said contracts are, therefore, in full force." (Tr. p. 8, Record p. 6-7.)

23. In support of the respective counts in Respondent's Trial Petition it prayed: (a) For injunction; (b) for damages for use of its property after November 1, 1941, in the sum of $500.00 per day; (c) in the alternative, for the reasonable value of the use of the property; (d) for indemnity in event damages from Petitioners' operations be imposed upon Respondent; (e) for exemplary damages; (f) for interest; (g) for general relief and costs (Par. VIII, Tr. 55-56, Record p. 46-47).

24. Final judgment was rendered in the Trial Court August 16, 1943, based upon the verdict of the jury, which submitted but one issue, to-wit, the reasonable value of the use made by Petitioner Trustee of Respondent's property; denied execution because of the bankruptcy proceedings and ordered a certified copy of the judgment properly authenticated to be prepared as a claim to be filed against Petitioner Trustee; authorized execution for costs against Petitioner St. Louis, Brownsville & Mexico Railway Company, and denied all other relief prayed for; judgment was

in favor of Petitioners on all issues except value of the use (Tr. p. 114-115, Record page 89-90).

25. The defense was urged thru objections to the charge in the Trial Court and thence carried forward by Petitioners that Respondent had permitted and had not prevented the operations after notice of termination and therefore consistently ratified the contract and waived termination (Par. 2, Tr. 90, Record p. 72).

26. The operations were commenced prior to and were being conducted when the Transportation Act was enacted and no certificate permitting the operations has ever been issued by the Interstate Commerce Commission, and Respondent has never contended Petitioners may lawfully abandon said operations without a certificate by the Interstate Commerce Commission permitting abandonment.

The foregoing we believe to be a fair full statement of the material facts reflected by the record necessary to proper understanding and determination of the questions presented by the Petition for Certiorari.

Respondent submits that, stripped of all abstract and collateral questions and confusion, three ultimate propositions of law are tendered by the Petition for Certiorari and its Supporting Brief:

1. The Bankruptcy Court had exclusive jurisdiction of this suit, which determined, without interference either of possession or use of any property by the Trustee, the reasonable value of the use of Respondent's property made by the Trustee in operation of trains.

2. The Transportation Act forbade termination of the contract in accordance with its terms, under which operations commenced, until a certificate essential to abandonment of operations issue.

3. The Interstate Commerce Commission has exclusive jurisdiction to fix reasonable value of use made of Respondent's property by the Trustee in operation of trains after termination of the contract, and with respect to which operations jurisdiction of the Interstate Commerce Commission has never been invoked.

Counter-Points and Authorities

Counter-Point One

(Counter to Points I and II, Pages 17 and 24 of Petitioners' Supporting Brief)

EXCLUSIVE JURISDICTION TO DETERMINE THE REASONABLE VALUE OF THE USE MADE BY PETITIONER TRUSTEE IN OPERATING HIS TRAINS ON RESPONDENT'S PROPERTY IS NOT VESTED IN THE BANKRUPTCY COURT, AND THE STATE COURT, HAVING THE PARTIES BEFORE IT, ACTED WITHIN ITS JURISDICTION TO DETERMINE SAID VALUE.

Authorities

Anderson et al. v. *Scandrett, et al.*, 19 Fed. Sup. 681;
Sec. 66, Judicial Code, Title 28, Sec. 125, U. S. C. A., 36 Stat. 1104;
Sub. (j), Sec. 77 of the Act relating to Bankruptcy, amended Aug. 27, 1935, 11 U. S. C. A. Sec. 205 (j), 49 Stat. 911;
Stay Order Dec. 2, 1935, S. F. 34, Record pages 124-125.

Counter-Point Two.

(Counter to Point III, Page 28 of Petitioners' Supporting Brief)

THE CONTRACT HERE INVOLVED CARRIED CONTRACTUAL CONSENT OF RESPONDENT IN 1904 TO OPERATIONS HERE INVOLVED FOR

50 YEARS, SUBJECT TO TERMINATION UPON NOTICE, WHICH WAS DULY GIVEN; AND THE SUBSEQUENT TRANSPORTATION ACT REQUIRING PETITIONERS TO CONTINUE OPERATIONS UNTIL A CERTIFICATE PERMITTING ABANDONMENT ISSUE DOES NOT PREVENT TERMINATION AUTHORIZED BY THE CONTRACT AND THEREBY CONTINUE USE OF THE PROPERTY FOR THE COMPENSATION FIXED IN 1904 UNTIL SAID PERMIT IS ISSUED.

Authorities

Sec. 1, Par. 18, Act Feb. 28, 1920, 41 Stat. 477, 49 U. S. C. A., Sec. 1, Par. 18;
C. & A. v. *T. P. & W.*, 146 I. C. C. Reports, 171, 182;
Central New England R. R. Co. v. *Boston Co.*, 279 U. S. 415, 49 S. Ct. 358;
Gaston v. *Rutland Co.*, 35 Fed. (2d) 685;
Powell v. *U. S.*, 300 U. S. 276, 57 S. Ct. 470;
T. & P. v. *G. C. & S. F.*, 46 S. Ct. 263, 270 U. S. 266.

COUNTER-POINT THREE

(Counter to Point IV, Page 34 of Petitioners' Supporting Brief)

EXCLUSIVE JURISDICTION TO FIX FAIR COMPENSATION FOR THE LAWFUL USE BEING MADE BY ONE INTERSTATE CARRIER OF A LINE OF RAILWAY OWNED AND USED BY ANOTHER INTERSTATE CARRIER, FIXING WHICH IS NOT INCIDENTAL TO A PERMIT AUTHORIZING SAID USE, IS NOT VESTED IN THE INTERSTATE COMMERCE COMMISSION, IN THE ABSENCE OF ANY AGREEMENT BETWEEN THE CARRIERS, AND IT, THEREFORE, HAS NO JURISDICTION OVER THE RENTALS FIXED BY THE JUDGMENT HERE.

Authorities

Sec. 1, Pars. 18 to 20, Act. Feb. 28, 1920, 41 Stat. 477, 49 U. S. C. A., Sec. 1, Par. 18;

Sec. 3, Par. 4, as Amended Feb. 28, 1920, 41 Stat. 477, Sec. 3, Par. 5 (f), as Amended Sept. 18, 1940, 54 Stat. 902, 49 U. S. C. A., Sec. 3, Par. 4;
C. & A. v. T. P. & W., 146 I. C. C. Reports 171, 182.

ARGUMENT

I

Exclusive jurisdiction to determine the reasonable value of the use made by Petitioner Trustee in operating his trains on Respondent's property is not vested in the Bankruptcy Court, and the State Court having the parties before it acted within its jurisdiction to determine said value.

The assumptions running thru the Supporting Brief and crystallized at page 40 to the effect the Trial Court arrogated to itself jurisdiction to interfere with the Possession and use of property under control of the Bankruptcy Court, and to treat its Trustee in conducting operations required by law as a trespasser will not be found to square with this record.

The judgment denied injunctive relief. It sustained only the count for the value of the use. It stipulated that a copy be certified to the Bankruptcy Court as a claim to be considered in its administration. The compensation claimed was for property and facilities of Respondent used by Petitioner Trustee in the operation of his trains.

It should not seem necessary to argue in answer to the contention that the final stay order of December 2, 1935, which was in force at the time this suit was instituted and which specifically, "provided, however, that suits or claims for damages caused by the operation of trains * * * may be filed and prosecuted to judgment in any court of competent jurisdiction * * *", was limited to train operations which inflicted personal injuries or damages

to freight in course of transportation; nor that the claim here was not caused by the operation of trains.

The history of stay orders in this proceeding and the causes assigned therefor by the Court, itself, in those orders should be conclusive against the contention of Petitioners that the count for compensation was without the exception. The stay order of November 14, 1933, stayed all suits until after final decree, *excepting only* "claims for injuries to or death of employees" (Par. 5, page 3 of Statement). That stay order specifically provided precisely what Petitioners contend should be held to be the true intent and effect of the repealing order of December 2, 1935, which still exists, therein declaring,

> "Whereas, Subdivision (j) of Sec. 77 of the Act relating to bankruptcy, as amended August 27, 1935, has made necessary certain changes in orders respecting the staying of suits against the debtors, now it is ordered:
>
> "That Order No. 116 heretofore entered in these proceedings on November 14, 1933, is hereby repealed. That commencement or continuation of suits against any of the debtor companies is hereby stayed and enjoined until after final decree entered in these proceedings, provided, however, that suits or claims for damages caused by the operation of trains * * * may be filed and prosecuted to judgment in any court of competent jurisdiction * * *." (Par. 6, page 4, Statement.)

The material change effected in said orders was to enlarge the right to sue in courts outside the Bankruptcy Courts from claims for "injuries to or death of employees" to "suits or claims for damages caused by the operation of trains". That repeal was declared by the Court to be required by Sub. (j) of the Act as amended. The prior order not only conflicted with said Sub. (j) but was also in

direct conflict with the express provision of Judicial Code Sec. 66, Title 28, Sec. 125, U. S. C. A., which provides that:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Entry of stay orders in disregard for Sec. 66 of the Judicial Code prior to the amendment of said Sub. (j) suggests the intent of Congress to make jurisdiction to stay actions in bankruptcy reorganization proceedings conform to the rule which has ever existed thru Sec. 66 of the Judicial Code, by amending Sec. 77 (j), August 27, 1935.

Contention of exclusive jurisdiction in the Bankruptcy Court and immunity of Trustees in reorganization under Sec. 77 (b) from suit arising out of carrying on the business was expressly overruled in *Anderson et al.* vs. *Scandrett*, 19 Fed. Sup. 681.

In the *Anderson* case plaintiffs brougtht suit in Minnesota against trustees of railway properties in reorganization through the Bankruptcy Court in Illinois, precisely as here. It was alleged that since October 17, 1935, the defendant trustees had a regular place of business within the jurisdiction of the court, and without license, and against the will and consent of plaintiffs said trustees defendants used on their railroad within the district, and are continuing to do so, inventions and improvements covered by patents belonging to plaintiffs. They alleged prior license agreements issued to the debtor railroad company had

terminated; but the trustees, notwithstanding, continued to commit acts of infringement. A permanent injunction was sought, with accounting of profits and damages sustained by plaintiffs resulting from the alleged infringement.

The debtor was in process of reorganization in the Northern District of Illinois upon a petition there filed June 29, 1935. The bill alleges the infringement commenced the date the trustees were appointed, October 17, 1935. The debtor petition contained the following injunction:

> "All persons * * * whatsoever and wheresoever situated, located or domiciled * * * from interfering with, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets * * * railroads, * * * in possession of the debtor * * * or in any way interfering with the same or any part thereof, or from interfering in any manner with the operation of its railroad or properties, or the carrying on of its business by the debtor under the orders of this court * * *."

The appointing court did not consent to prosecution of the suit. The trustees there did not answer to the merits, as here, but specially objected to the jurisdiction of the court on the grounds, among others, the injunction prayed for could not be granted without disturbing the assets of the debtor and interfering with the railroad and its operation in violation of the order entered by the appointing court.

For reasons fully stated in the opinion (Appendix Par. 7, p. 39), the right to sue for damages for infringement of a patent by Trustees after their right of use had terminated, and for injunction, was sustained. Here, the suit is for damages as the reasonable value of the use of property after

the right to use under a contract fixing a basis of compensation had terminated.

This case is readily distinguishable from all the cases cited by Petitioners with respect to exclusive jurisdiction for this: The judgment awarded here is for a claim, jurisdiction over which is preserved to the State Court by Sec. 66 of the Judicial Code, 36 Stat. 1104; by Sub. (j), Sec. 77 of the Bankruptcy Act as amended August 27, 1935, 49 Stat. 911; by the exception contained in the stay order entered December 2, 1935; by orders of the Bankruptcy Court May 9 and June 22, 1933, authorizing Petitioners to answer suits; and does not interfere with or disturb possession or use of any property belonging to the bankrupt and in the custody of the Bankruptcy Court. In each case cited it will appear that the judgment did, or its necessary effect would be to, disturb possession or use, or, as in *Ex parte Baldwin*, 291 U. S. 610, did not result from affirmative operations.

Petitioners strenuously endeavor to argue this case within the general rule that neither possession nor use of property actually in the custody of the Bankruptcy Court may be disturbed by another court. It is said the petition here contained a count for injunction which, if granted, would have disturbed possession. The petition also contained a count to recover damages as compensation caused by the operation of trains, and there was no effort to strike the injunction count from the petition. At the end of the trial Petitioners prevailed in the final judgment on that count. It at no time imposed injury nor interference with Trustee's possession, operation or use.

It is said the cause of necessity interferes with operations of the Trustee. There is no more consistency between that statement and the facts in the record and the defense of waiver of termination of the contract, urged upon the Trial Court in bar by Petitioners because Respondent permitted

instead of interfering with the operations, than between their Points I that exclusive jurisdiction of this suit is in the Bankruptcy Court, and IV that exclusive jurisdiction to fix rentals lies in the Interstate Commerce Commission, both simultaneously urged upon this Court.

It is said the rights under the 1904 contract passed to the Trustees; that they are property rights; and to destroy those rights interferes with the property in the custody of the Court. Petitioner Trustee took no greater rights in law under the contract than it accorded the bankrupt. When the Trustee voluntarily took the contract with its benefits, he likewise took it with its obligations. *Taylor* v. *Santa Fe*, 34 Pac. (2d) 1102, 38 N. M. 457. One obligation was to submit to termination upon notice, which was given. When the contract was terminated according to its own terms, the rights flowing from it, too, terminated. Petitioner could not evade that situation by ignoring the notice and his obligation to observe it. By no twist of sound reasoning may it be fairly concluded that rights subject to a terminable contract continue to be property in the custody of the Bankruptcy Court after termination of the contract. If the judgment of the State Courts stand, the only difference between conditions prior to termination and now, so long as Petitioners elect to continue their operations, is, that for the use they make of the property they must pay the reasonable value and not that fixed by the 1904 contract.

It is said the judgment of the State Court "would impede the effectuation of a plan of reorganization, and one involving matters of national interest, the determination of which is vested exclusively in the Interstate Commerce Commission."

The question is not of jurisdiction over reorganization. The question is, does the cause of action on which Respondent sued and recovered judgment, arise out of the operation of trains, jurisdiction over which was by the Reorganization

Act, by the Judicial Code, and by the stay order of the Bankruptcy Court itself, reserved to whatever court might acquire jurisdiction of the subject matter and of the parties. It is no sound objection to the exercise of the jurisdiction that its result would be to deprive the Trustee of continued use of Respondent's property after termination of his contract right for less than the reasonable value thereof; nor that it would "impede" his reorganization plans. Neither national interest nor any rule of law nor fair dealing calls upon a solvent carrier out of bankruptcy to submit to use of its property by an insolvent carrier in bankruptcy for less than the fair value of its use.

Moreover, the record does not sustain petitioner as Trustee under Sec. 77 of the Bankrutpcy Act, representing a covey of insolvent railroad corporations which have been enjoying the benefits of said Act continuously for 12 years in one proceeding, with no reorganization in sight, so far as this record shows, in imputing responsibility in part for the delay because of this suit. If public policy be involved, it would seem the statement of public policy in such matters made in the *Taylor* case, relied upon by Petitioners, would be quite apropos that,

> "There is no public policy recognized by the courts which allows any person, natural or artificial, to take the property of another and appropriate it to its own use, and deny to the person who is innocent of fraud the right to reclaim it. * * * On like principle, the rule is, in the case of receivers, that the receiver cannot accept the benefits of a contract without carrying out its obligations. * * * He may, under the order of the Court, exhaust the assets of a railroad corporation in experiments, but we know of no rule of law which permits him to levy a tribute on others."

It is said the main purpose of the suit was to interfere with property and operations. In the teeth of the judgment

which is sought to be reviewed which, if enforced, does only one thing, to-wit, fix the reasonable value of the use of Respondent's property made by the Trustee in operating his trains without interference, to be certified to the Bankruptcy Court as a claim in administration, how can it be seriously urged in argument that the main purpose of such suit is to interfere with the property and the operations of Petitioners?

And, finally, the Bankruptcy Court entered its order May 9, 1933, which expressly authorized the debtor to defend any suits which may be brought in any court, but withheld authority to burden the property in any manner or for payments to be made without consent of the Bankruptcy Court. On June 22, 1933, said Court entered its order which expressly conferred upon the Trustee all previous authority conferred on the debtor, thereby giving the Trustee the same power with respect to defending suits as had been previously given on May 9, 1933, to the debtor (Pars. 3 and 4, page 2 of Statement). Said orders gave Petitioners, Debtor Brownsville Company and Thompson, Trustee, advance blanket authority, in their discretion, to defend suits in any courts of competent jurisdiction whose judgments authorized no burden upon the property in the custody, nor required payments without consent, of the Bankruptcy Court. It follows that when Petitioners answered in this suit and defended upon the merits in the State Court for more than one year, as they did, the State Court had effective consent of the Bankruptcy Court thru said answers so filed to exercise jurisdiction over the subject matter of the suit, subject to the limitation against rendering any judgment which burdened or interfered with said property or sought to enforce payment without consent of said Court, and such jurisdiction could not be thereaffer withdrawn by suggestion of bankruptcy and exclusive jurisdiction in the Bankruptcy Court, as Petitioners sought to do.

Therefore, this suit and judgment, which in no wise burdened nor interfered with possession or operations of said property, but solely determined the value of the use of the property by the Trustee, to be certified to the Bankruptcy Court as a claim, exclusive jurisdiction to render such judgment was not in the Bankruptcy Court, but was the exercise of a lawful jurisdiction by the State Court.

We do not understand *In Re C. & E. I. Company, Gourley,* v. *Wham,* 121 Fed. (2d) 785, to be any authority for the proposition that claims or suits for "damages arising out of the operation of Trains" as used in Sec. 77, Subdivision (j) of the Bankruptcy Act, is limited to personal injury actions. The Court was there dealing solely with a personal injury action. The contention was, the State Court had no jurisdiction because the injury arose after adjudication to which said Subdivision (j) does not apply. The Court very definitely held that said Subdivision (j) extends to personal injury claims arising out of operations, whether before or after adjudication. It concluded Congress had personal injury claims in mind for inclusion. But it did not express any thought those were the only claims included. The Court said, at page 789:

> "Construing the proviso as a whole, it would seem the Congress intended to avoid any stay order in any of these cases where the action was for a judgment for damages arising out of the operation of the trains."

This indicates the test to be, does the claim or suit arise out of the operation of the trains, rather than, is it a personal injury claim.

II

The contract here involved carried contractual consent of Respondent in 1904 to operations here involved for 50 years, subject to termination upon notice, which was duly given; and the subsequent Transportation Act requiring Petitioners to continue operations until a certificate permitting abandonment issue does not prevent termination authorized by the contract and thereby continue use of the property for the compensation fixed in 1904 until said permit is issued.

The portion of Par. 18, Sec. 1 of the Interstate Commerce Act, of February 28, 1920, 41 Stat. 477, as amended by Act Sept. 18, 1940, 54 Stat. 899, quoted by Petitioners at page 26 of their Brief as follows:

> "* * * and no carrier by railroad subject to this part shall abandon all or any portion of the line of railroad or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment, * * *"

may be accepted as the pertinent portion of said paragraph here involved.

There is no contention of limitation against the power of Congress to outlaw contracts between carriers, nor that by any sort of evasion may an interstate carrier conducting operations at the time the Act became effective lawfully abandon those operations without consent of the Interstate Commerce Commission.

Petitioners say, therefore, that because the operations may not be lawfully abandoned without the permit, it follows that the contract burdened with a termination clause under which the operations commenced with consent may not be terminated, and any conclusion to the contrary, really, "becomes absurd."

The question plainly presented is: Did the Transportation Act destroy the termination clause of the contract and perpetuate the compensation fixed by the contract until the operations commenced under the contract shall have been abandoned, in forbidding the operations to be abandoned without a permit? The result of affirmance of that question, when viewed from its practical aspect, may be thus stated: So long as Petitioners would elect to continue their operations, they could enjoy the use of the property without respect to the reasonable value thereof, and solely on the basis of compensation fixed in a contract, subject to an unqualified termination clause, made 40 years ago. Nothing short of clear words in the Act (which are not there) evidencing such intent should induce a construction which would lead to so gross an injustice.

The power of Congress to have included in the Act a provision that all contracts were continued in force until operations commenced thereunder should be lawfully abandoned, or even until termination of the contract should be authorized by the Interstate Commerce Commission, as it did enact with respect to the operations, is not questioned. But did Congress do that? It dealt solely with operations. It said nothing about the contract nor the compensation. The Interstate Commerce Commission declined to entertain jurisdiction of an application by Respondent for authority to terminate this contract thru declination by its Secretary to file the application, he advising both Respondent and Petitioner that the jurisdiction of the Commission pertains solely to the operations and not to the contract. Petitioners say that was no act of the Commission. It was that of its Secretary, acting officially. The presumption is indulged in his favor in the collateral attack by Petitioners that he acted lawfully, under direction of the Commission, and not otherwise. Moreover, the Commission itself has expressly held that Sec. 1, Pars. 18 to 21 of said Act, confer no juris-

diction upon the Commission over the terms of the contract, in the absence of an agreement. *C. & A.* v. *T. P. & W.*, 146 I. C. C. 171.

A majority of the Commission held, at page 182 of 146 I. C. C. Reports:

> "* * * That the operation of the Alton over the tracks of the T. P. & W., between Dwight and Peoria cannot lawfully be discontinued without our certificate; and that the discontinuance of such operation without our authority may be prevented by injunction and is subject to the penalties provided by Paragraph (20) of Section.
>
> "We express no opinion as to the adequacy of the rental or the propriety of the other terms and conditions under which the Alton is now operating over the track of the T. P. & W. We have no authority to adjust that matter in this proceeding. The law, no doubt, provides a remedy for any injustice in that regard."

Petitioners next contend that the contract of 1904 and the operations now conducted are one and inseparable; that termination of the contract would of necessity terminate the operations, and, therefore, the contract may not be terminated without a prior permit to terminate the operations. If this be true, it should follow that lawful abandonment of operations would terminate a contract. The contrary has been directly held by this Court. *Central New England R. R. Co.* v. *Boston Co.*, 279 U. S. 415, 49 S. Ct. 358 (359). There, the operating company applied for and procured a permit to abandon operations commenced and conducted under a contract. The operations were abandoned. In reliance upon the permit, the contract was repudiated. It was there argued, too, that the contract and operations were inseparable, and, therefore, when the operations lawfully terminated, so did the contract. The State Court of Massachusetts differed, and, in a suit to recover upon the contract as though the operations continued, ren-

dered judgment upon the contract. In the course of the opinion upholding the Massachusetts judgment, this Court said:

> "To the suggestion of Petitioner (Central Company) that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision, nor any language suggesting it. We need not decide whether such may be the effect of a proper order of the Commission on contracts previously entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict."

In the case of *Gaston* v. *Rutland Co.*, 35 Fed. (2d), 685, 686, 687, receivers exercised their lawful right to reject and terminate a contract, under which operations were being conducted. They could not lawfully abandon the operations without compliance with Sec. 1, Par. 18 of the Transportation Act. Therefore, the receivers contended that because the law imposed the obligation to continue operations and the contract was ended, the owning carrier could not fix the rentals of its own property. In overruling that contention the Court said:

> "Granting the undoubted duty of the receivers to operate this branch line until lawfully relieved from so doing (49 USCA, Sec. 1, Par. 18), it does not follow that they could not elect to repudiate the existing contract when they did. Ordinarily, receivers have a reasonable-time in which to elect whether or not to adopt executory contracts."

and:

> "This duty to operate their trains did not carry with it the right to use the property of the Rutland Railroad in so doing on terms imposed upon the owner without its consent."

It is, therefore, submitted that operations subject to Sec. 1, Par. 18 of the Transportation Act and a contract fixing compensation are not inseparable and that either may exist without the other, and that the doctrine contended for by Petitioners to the effect that the Transportation Act, which imposed upon Petitioners the duty to continue their operations until a permit of abandonment be procured from the Interstate Commerce Commission, inseparably bound the contract to the duty to operate and thereby froze in favor of Petitioners the 1904 basis of compensation so long as the operations continue, is not supported by reason, statute nor decision.

It is argued the Act imposes upon Respondent the duty to apply for and procure a permit for Petitioners to abandon their operations over which Respondent has no control. They say Respondent could do so under the holding in *A. T. & S. F.* v. *Railroad Commission*, 283 U. S. 380, 51 S. Ct. 553.

That was not a controversy between adversely interested carriers. It was solely between carriers of a common interest, on the one hand, and the Railroad Commission of California and the City of Los Angeles, on the other hand, with respect to forcing construction of union terminals in the City of Los Angeles. The only obstacle to enforcement by state and municipal authority of their orders to construct the terminals was the barrier raised by the carriers of essential issuance by the Interstate Commerce Commission of the permit under Sec. 1(18) of the Act. The carriers would not apply for the permit, but the City of Los Angeles did. Upon that application the permit was issued.

This Court overruled the contention the permit was void and held the right to ask for the permit was not confined to the interested carriers but could be made by any proper party in interest. Petitioners say Respondent is a proper party here, and may, therefore, apply for a certifi-

cate. There, when the permit issued, state and municipal enforcement of local law proceeded. There is no authority anywhere to force Petitioners to abandon their operations on Respondent's property. A permit would be but a mere gesture, for Petitioners have plainly indicated their fixed intention to not voluntarily abandon.

This Court seems to have already held between adversely interested carriers that one not conducting or proposing to conduct the operations is not a party having proper interest to make an application with respect to the other's operations or not under Sec. 1(18) of said Act.

In *T. & P.* v. *G. C. & S. F.*, 46 S. Ct. 263, 264, 270 U. S. 266, 273, this Court said with respect to the right of the adversely interested carrier in respect of operations to make an application under Sec. 1(18) of the Act:

> "But a party in interest, who is opposed to the construction, is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition."

If the carrier opposed to construction may not initiate an application with respect thereto, it would seem to follow that a carrier opposed to operations could not initiate an application with respect thereto.

In *Powell* v. *United States*, 300 U. S. 276, 57 S. Ct. 470, 476, the Central Railroad objected to operations in interstate commerce by the Seaboard over leased tracks for which no permit had been issued under Sec. 1(18), and procured an order by the Interstate Commerce Commission cancelling interstate tariffs over the leased line. The Seaboard sought by direct action to cancel the order and contended, if the operations were not in public interest, the Central should have invoked jurisdiction of the Interstate Commerce Commission under Sec. 1 (Pars. 18 to 20 inc.) for determination of that issue.

In response to that contention this Court said:

> "The Central was not authorized by the Act to initiate a proceeding before the Commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was by suit under Sec. 1, Par. 20" (Page 287).

So here, Petitioners could apply for a permit to abandon their own operation, or, if they desire the Commission to acquire jurisdiction over the compensation, they could apply for a certificate under Sec. 1 (Pars. 18-20), or Sec. 3 (4) of said Act, in which event Respondent could be heard, or they may continue their operations and ignore the Interstate Commerce Commission with respect thereto, because operations were being conducted when Sec. 1, Par. (18) was enacted. So long as Petitioners continue without a certificate and avoid submitting to the Commission the issue of public necessity and convenience or not requiring said operations (now protected because conducted when the Act became effective in 1920), there is no remedy to Respondent through which to recover reasonable value for the use being now made of its property in such operations, except by a suit.

Petitioners assert,

> "The decision below is reducible to the single proposition that Tex. Mex., without subtracting a thing from the rights which in 1904 it granted to the St. L. B. & M., has succeeded in cancelling out all those (and only those) provisions of the contract prescribing the amounts payable. That proposition is patently unsound."

Sufficient answer to this should be the undisputed record that the entire judgment with respect to compensation, and which is the only portion of the judgment which pinches

Petitioners, is squarely grounded upon the proposition that the contract which Petitioners seek to continue contained a reciprocal termination clause which was binding upon them and exercised in accordance with the contract, which was terminated as a whole long prior to commencement of the suit.

There is no conflict between the decision in this case and in *Taylor* v. *Santa Fe*, 34 Pac. (2d), 1102, 1104, 38 N. M. 457 (Par. 12 (c), p. 8 of Petition).

No analogy exists between the facts of the two cases. In the *Taylor* case officers of the Santa Fe and of the San Juan Company were identical. The San Juan Company conducted operations on Santa Fe tracks. The San Juan Company executed a conveyance or release of all rights to operate upon the tracks of the Santa Fe, stipulating "neither of the parties is under any obligation to secure the approval of this indenture by the state or federal authority." Upon the conveyance or release further operations by the San Juan Company were prevented on the tracks of the Santa Fe. A receiver for the San Juan Company sought to continue said operations upon the ground no certificate permitting abandonment had been issued by the Interstate Commerce Commission. Such certificate was undoubtedly essential to lawful abandonment under Sec. 1, Par. 18 of the Transportation Act. The certificate could not be dispensed with thru private stipulations. Yet, the Santa Fe Company, relying solely thereon, refused to permit the receiver to continue said operations.

In overruling the Santa Fe contention, the Court said in part:

> "The necessary effect of the attempted reconveyance of April 17, 1931, would be an abandonment of operations by the San Juan Railroad without the consent of the Interstate Commerce Commission, prohibited by, and made a penal offense under, federal statute." (Page 1104.)

The obvious purpose of the contract to which actual effect was given was for the San Juan Company to abandon operations. Upon those facts it was no doubt correctly held that the necessary effect and purpose of the contract was to create abandonment of operations without a permit, which was unlawful.

Here, operations were commenced prior to the Transportation Act under authority of a contract made with Respondent in 1904 which contained a termination clause. The Transportation Act of 1920 clearly interposed the burden upon Petitioners to continue their operations until they should procure from the Interstate Commerce Commission a certificate permitting abandonment, contract or no contract. It interposed upon Respondent the Duty to respect that burden. But, it does not follow, in the absence of words so stipulating (and they are absent) that the contract rights of either party governing operations were destroyed or that Respondent was by the Act to be forced to accept as compensation for its property, so long as operations should continue, that which it agreed by contract, with a termination clause, to accept 40 years before, under entirely different economic and industrial conditions. All Respondent did was exercise its right of termination, and, when Petitioners continued the use, to demand the fair value of the use as compensation, different from the 1904 basis, which Petitioners resisted, all the while continuing operations and use unmolested.

It is, therefore, submitted there is no conflict between the holdings of the New Mexico Court in the *Taylor* case and of the Texas Court here.

III

Exclusive jurisdiction to fix fair compensation for the lawful use made by one interstate carrier of a line of Railway owned and used by another interstate carrier, fixing which is not incidental to a permit by the Interstate Commerce Commission authorizing said use, is not vested in said Commission in the absence of any agreement between the carriers, and it has no jurisdiction over the rentals fixed by the judgment here.

The exclusive jurisdiction contended for should be conferred by Congress in clear language and rest on more than vagarious arguments on public policy and possible interference with plans of a bankruptcy reorganization trustee. Because the Commission has jurisdiction over rentals in prescribed situations does not tend to establish exclusive jurisdiction over all rentals.

Petitioners cite and quote from *Palmer* v. *Massachusetts*, 308 U. S. 79, and *Bankruptcy Act*, Sec. 77 (o), Title 11 U. S. C. A., Sec. 205 (o), both dealing with reorganization proceedings and recognizing, notwithstanding it is for the Trustee to determine what lines should be abandoned, nevertheless the abandonment by the Trustee is subordinate to the permit required by Sec. 1, Par. 18 of the Interstate Commerce Act, thereby leaving in the Interstate Commerce Commission ultimate jurisdiction over the question of abandonment or not. That has nothing to do with rentals.

Transit Commission, et al. v. *U. S.*, 289 U. S. 121, is relied upon. Rentals there dealt with were not with respect to a controversy where operations were being lawfully conducted both without any permit from the Commission or an agreement fixing rentals. Those rentals were fixed by mutual agreement of the carriers. It was attached to a joint application for a certificate under Sec. 1, Par. 18 of said Act. Sec. 20 of the Act authorized the certificate,

if issued, to be burdened by any terms and conditions prescribed by the Commission. The Commission issued the certificate and approved as a condition that the agreement tendered should govern.

The precise question necessary to a decision of the case was whether or not the Interstate Commerce Commission, to the exclusion of the New York State Commission, could issue the certificate and permit the operations upon the conditions set forth in the certificate.

This Court there decided the following questions:

1st. The Interstate Commerce Commission had exclusive jurisdiction to issue a certificate permitting continuation of a trackage contract between carriers in New York upon the conditions of a contract which accompanied the application for the certificate.

2d. That Sec. 1 (18) of the Interstate Commerce Act applies to railroad operations under trackage rights pursuant to a contract tendered with the application.

3d. That such jurisdiction exists where the trackage rights were enjoyed before enactment of the Transportation Act.

4th. The Interstate Commerce Commission in acting upon an application for a permit to commence or continue operations under trackage rights may prescribe as a condition thereof that the operations conform to terms and conditions which the interested carriers have agreed upon, and submitted with the application.

No fact there is analogous to any fact here. The Court there said, in part, as quoted by Petitioners:

> "The Act, including par. 18 and related provisions, is construed to make Federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. * * * On the taking effect of the Transportation

Act the State Commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive." (Pages 128 and 129.)

The "full extent" of jurisdiction exerted on the facts of the Transit Commission case with respect to rentals was to approve the agreement and carry it into the certificate. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, is relied upon. The controversy was essentially a suit by the Oil Company to recover on allegations that unjust and unreasonable rates had been exacted over protest. The Texas & Pacific Company defended on the ground the rates had been established in accordance with the Acts of Congress thru the Interstate Commerce Commission and were conclusive until set aside. The defense was sustained. Jurisdiction of the Interstate Commerce Commission over rentals was not involved.

It is, therefore, submitted the cases cited by Petitioners do not support the point of exclusive jurisdiction in the Interstate Commerce Commission to fix rentals.

Moreover, we submit it to be clear the Interstate Commerce Commission has not been vested with original independent jurisdiction with respect to rentals, particularly where, as here, the operations are lawfully conducted without jurisdiction of the Interstate Commerce Commission having ever been invoked with respect to the operations.

The Commission is vested by Sec. 1, Pars. 18 to 20 inclusive of said Act with exclusive jurisdiction over permits to abandon or to commence operations and, when that jurisdiction is invoked, to prescribe the conditions upon which the operations may commence. If the carriers have agreed upon rentals satisfactory to the Commission, it may make the permit conditioned upon the agreement. *Transit Com-*

mission et al. v. *United States*, 289 U. S. 121. If the Commission is dissatisfied with the agreement tendered, it may refuse the permit.

Congress has also vested the Commission with jurisdiction in certain events to prescribe the compensation for use of terminals. (Sec. 3, Par. 4 of the Act as Amended Feb. 28, 1920, Chap. 91, Sec. 405, 41 Stat. 479, Sec. 3, U. S. C. A. Title 49, as Amended Sept. 18, 1940, 54 Stat. 902.) But, the jurisdiction there granted is not original and independent. It does not arise until the Commission has found: First, to be in the public interest; second, to not substantially impair the ability of an owning carrier to handle its own business, to permit another carrier the use of terminal facilities and main line track for a reasonable distance outside the terminal. After those findings are made, and in event the carriers fail to agree upon the rental, jurisdiction of the Commission to fix it arises, subject, however, to court review.

No language found in either statute suggests an intention by Congress to vest in the Interstate Commerce Commission any jurisdiction of a controversy between carriers over the reasonable value of the use made by one of the other's property in the absence of an agreement, and not incidental to exercise of jurisdiction by the Commission with respect to operations.

The Interstate Commerce Commission has itself expressly held that Sec. 1, Pars. 18 to 21 of the Interstate Commerce Act confer no jurisdiction upon the Commission over the rentals or contract when acting with respect to operations, in the absence of an agreement between the carriers. The Commission, acting thru a majority, held at page 182, 146 I. C. C. Reports, in the matter of *C. & A.* v. *T. P. & W.* (*supra* page 22).

These operations were being conducted when the Transportation Act became effective. They now exist perforce

of the Transportation Act. Neither the Interstate Commerce Commission nor anyone else, except Petitioners themselves, is vested with lawful power to terminate such operations. Petitioners may not lawfully do so without a permit from the Interstate Commerce Commission.

It is, therefore, submitted the Interstate Commerce Commission has no exclusive, if indeed any, jurisdiction over the rentals the subject of the judgment here.

Conclusion

That Petitioners covet indefinite use of Respondent's property in their operations for the compensation fixed by the 1904 contract is scarce to be doubted.

They tenaciously seek to retain the benefit of that compensation by projecting the contract so long as they desire to use the property, but repudiate entirely its termination clause.

They urge the State Court was without jurisdiction to render the judgment which fixed only against them as a claim the reasonable value of the use of the property made by them, upon the simultaneous inconsistent contentions that exclusive jurisdiction over the subject matter is in the Bankruptcy Court and in the Interstate Commerce Commission. All the while they fail and refuse to invoke or to co-operate in invoking the exercise of jurisdiction by the Interstate Commerce Commission.

They urge that the Transportation Act of 1920 (which forbade without an Interstate Commerce Commission permit subsequent abandonment by them of their operations then conducted under the 1904 contract) welded inseparable the contract and the operations, which would mean, if true, Respondent lost the benefit of termination both by notice and at the end of the term fixed by the contract, notwithstanding no word about contracts is found in the applicable section of the Act.

It is submitted no language contained in the Act supports the contention of Petitioners, nor justifies an inference Congress intended, that the prohibition against abandonment of operations by Petitioners without a permit under Sec. 1, Par. 18 of the Act, should prevent termination of the contract in accordance with its own provisions, which must result if their contention be sustained; that no rule forbidding invasion of the Bankruptcy Court jurisdiction or its administration has been transgressed; that suits of this character were expressly saved by Sub. (j), Sec. 77 of the Act as amended August 27, 1935, and by the stay order subsequently entered by the Bankruptcy Court pursuant to said amendment.

It is respectfully submitted that the Petition for Certiorari is wholly without merit and should be denied, and Respondent so prays, and for its costs.

Respectfully submitted,

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The Texas Mexican Railway Company.

APPENDIX

(1)

"Kingsville, Texas, August 29th, 1904.

Mr. Thos. W. Dodd,
Vice-President, Texas Mexican Ry.,
Laredo, Texas.

DEAR SIR:

I have your favor of the 26th transmitting contract in duplicate for joint use of track between Robstown and Corpus Christi. Since draft of contract was submitted to me in July, I notice a change as to period of lease that will affect our donations at Corpus Christi. The term of lease as agreed upon between Mr. Clark and ourselves was for fifty years and the draft of contract as prepared was for the same period, but the agreement submitted with your letter of the 26th has reduced this to a term of five years. Permit me to suggest that we adhere to the original agreement for the full period of fifty years with clause providing that the contract can be terminated by either party upon twelve months written notice or by one or the other of some violation of its terms, conditions and limitations. You understand that we are to collect $10,000.00 from the Donation Committee at Corpus Christi, $5,000.00 of which is to be used for terminals and improvements; in addition to this, we participating in the expense on car basis of track repairs, which are now underway, for the entire distance between Robstown and Corpus Christi, and if cancelation clause of twelve months is inserted there should be no objections to the full period of fifty years as agreed upon. You understand, of course, a sixty days notice of cancelation would not give us sufficient time to construct an independent line between the two points.

Trusting that you can straighten this matter out at your earliest convenience in order that contract can be properly executed and approved by the various Boards, I am,

Very truly yours,

JEFF N. MILLER.

Enc.

(S. F. 160-161; Record Pages 161-162.)

(2)

"This contract shall take effect on the first day of November, 1904 and shall continue for the full term of 50 years from date unless sooner terminated by the parties hereto, or by one or the other for some violation of its conditions and limitations, and shall inure to the benefit of and shall be binding upon the successors and assigns of either party hereto.

"It is further agreed that this contract may be terminated without giving any reason therefor by either party upon giving 12 months notice of such intent to terminate the lease; the parties to the above and foregoing agreement mutually covenant and agree to observe their respective obligations imposed by this agreement, and the party of the second part (Brownsville Co.) accepts the conditions of said agreement and obligates and binds itself for the full period of this contract to operate at least one train each way daily over the line of the party of the first part between Robstown and Corpus Christi." (S. F. Vol. 1, pp. 53, 64, 65 and 159; R. 145).

(3)

Interstate Commerce Commission
Office of the Secretary
Washington

W. P. BARTEL

Secretary

Mr. J. D. Dodson, General Counsel,
Texas Mexican Railway Company,
1819 Smith-Young Tower,
San Antonio, Texas.

DEAR SIR:

This will acknowledge the receipt of your letter of August 4th, enclosing original and nine copies of the application of the Texas Mexican Railway Company for authority to cancel its trackage agreements with the St. Louis, Brownsville & Mexico Railway Company, under which the latter com-

pany operates over the line of the Texas Mexican between Corpus Christi and Robstown, Texas.

The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1 (18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company. I note that on November 1, 1940, notice in accordance with the terms of the trackage agreements was given to the Brownsville Company of the intent of the Texas Mexican to cancel the contract. No application has been filed by the Brownsville Company.

Accordingly the application and copies are returned herewith.

Very truly yours,

W. P. BARTEL
Secretary

Encls.

Cc—
Mr. H. R. Safford,
St. Louis, Brownsville & Mexico Railway Company,
Houston Texas."

(S. F. pp. 157-158; R. 185.)

(4)

"Defendants admit that Mr. H. R. Safford, Senior Executive Assistant, Missouri Pacific Lines, Houston, Texas, received from Mr. M. M. Leyendecker, Vice-President and General Manager for plaintiff, a letter dated November 5, 1941, reading as follows:

DEAR MR. SAFFORD:

In a letter dated October 28, 1940, I notified you, Mr. H. M. Lull of the T. & N. O. Ry. Company and Mr. A. D. Mims of the San Antonio and Aransas Pass Ry. Company of this carrier's intention to cancel and terminate that certain contract dated November 1, 1904, and all supplemental contracts and memorandums of agreement thereto, con-

cerning their use of rails or tracks of The Texas Mexican Railway Company in its yard at Corpus Christi, Texas, and betwen Corpus Christi and Robstown, Texas, said cancellation to be effective November 1, 1941.

We have not to this date received from you any definite statement as to what you propose to do and we find you still operating on our rails. As the cancellation became effective November 1, 1941, and there is a daily accruing liability by reason of your occupancy of these rails, this is to advise you that effective this date there will be a daily charge of $500.00 a day for the use by you of these facilities. I desire to further advise you the other interested parties mentioned in the first paragraph of this letter have notified us that they will waive any further notice and join us in application to the I.C.C. for approval of the cancellation of the contract. We trust you will be willing to do likewise.

That by the same letter referred to in Paragraph 21 next preceding request was made on Mr. Safford as Senior Executive Assistant, The Missouri Pacific Lines, to join plaintiff in an Application to the Interstate Commerce Commission for approval of the cancellation of said contract of November 1, 1904."

(5)

"Answering Section (b) of IV of said petition, these defendants admit that on or shortly after October 28th, 1940, they received from plaintiff a letter bearing said date, requesting defendants to consider said letter as formal notice on the part of the Texas Mexican Railway Company of its intention to terminate and cancel, effective twelve (12) months after November 1, 1940" * * *.

(7)

"This statute has been held applicable to receivers appointed by courts of bankruptcy (citing authorities). The trustees herein are a combination of ordinary trustees in bankruptcy and receivers in equity. It would seem, therefore, that where there is an operating trusteeship under Section 77 of the Bankruptcy Act, and a claim arises

against said trustees by reason of the carrying on of said business, suit may be commenced without previous leave of court. Moreover, it is generally recognized that the last clause of Section 66 of the Judicial Code, 28 U. S. C. A., Section 125, reading, 'But such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice,' merely reserved to the appointing court the sole power over the matter of satisfaction of the rights determined in such other courts. (Citing cases.) Nor does the injunction in the order of the appointing court prevent the institution and prosecution of this suit in this jurisdiction. True, an injunction is sought with an accounting of profits and damages, but the determination of the issues herein will not violate the restraining order that was entered, nor will the institution of this suit interfere with the trustees' operation of the railroad. Any injunction that may be entered herein must be limited so as to comply with the appointing court's order; for instance, to permit the railroad to keep the alleged infringing devices upon paying reasonable compensation and to enjoin future infringement. But there is no basis for the contention that suits arising by reason of the operation of this railroad by the trustees must be lodged in the venue of the appointing court. The very impracticability of such procedure is apparent. Certainly, it could not be urged that all the shippers doing business with the railroad company while under trusteeship must proceed with their claims before the appointing court. It is recognized that the appointing court must have complete and exclusive jurisdiction to prevent any interference with the property of the debtor which hinder or delay the ultimate reorganization, but the determination of claims that will not be discharged by the bankruptcy proceeding may be determined in any forum where jurisdiction is obtained. The relief to be granted, if any, in view of the injunction of the appointing court, can be determined later." Anderson et al v. Scandrett et al, 19 Fed. Sup. 681 (683).